

TRAILBOSS ENTERPRISES, INC.

CONTRACT NO. V463P-0048-95

VABCA-5454R & 5471R

**VA MEDICAL CENTER AND REGIONAL
OFFICE
ANCHORAGE, ALASKA**

Eric J. Brown, Esq., Jermain, Dunnagan & Owens, Anchorage, Alaska for the Appellant.

Glen E. Woodworth, Esq., Trial Attorney, Anchorage, Alaska; *Charlma J. Quarles, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

MOTION FOR RECONSIDERATION

The Government has filed a MOTION FOR RECONSIDERATION of the Board's Decision in these Appeals dated August 31, 1999, and received by the Government on September 14, 1999. The Appeals are reported at 1999 WL 692856 and familiarity with the Board's findings is presumed.

As the Board has noted on numerous occasions, the primary purpose of reconsideration is to allow a party to present significant, newly discovered evidence or evidence not readily available at the time of the principal decision. *Saturn Construction Co., Inc.*, VABCA No. 2600R, 88-3 BCA ¶ 21,183; *Dawson Construction Company, Inc.*, VABCA No. 1711, 85-1 BCA ¶ 17,788. Motions for reconsideration which do not allege newly discovered evidence and which merely repeat arguments which were fully considered by the Board in reaching its decision are ordinarily denied.

The Government argues that it had authority to withhold payment under the Progress Payments clause. The Government says the VA was only required to have “substantial evidence” that the Contractor failed to comply with any material requirement of the Contract. The Government then proceeds to argue that it provided evidence, unrebutted by Appellant, that the cost of materials alone to correct the full casket crib site was approximately \$18-20,000.

We considered all of the facts and arguments when reaching our decision. We have no disagreement with the general principles of law enunciated by the Government, although incomplete, concerning the general right to withhold payment pursuant to the INSPECTION OF SERVICES and PAYMENTS clauses.

Under the facts in this case, a reprocurement by formal advertising with the receipt of bids from the particular two bidders involved was not reasonable and prudent. We found that the Government failed to establish by a *preponderance* of the evidence its costs in these appeals. The Government’s Motion only reinforces this finding. The Motion cites us to Government’s redirect of Mr. Carlson, who provided the only evidence, other than the two bids, concerning the reprocurement cost:

Q How much did you spend on materials to redo the crib sites?

A The cre--- or the full casket burial site, it was right around \$18, 20,000.

Q And then how much for the cremation? Was there any cost?

A The cremation, oh, approximately \$7,000. And it was a total bill on that, and I think there was maybe \$3,500 or \$4,500 in materials. I can't—right off the top of my head, I can't tell you.

(Tr. 518)

This is not sufficiently credible evidence, particularly where there was no documentary evidence of any kind submitted to substantiate the reprocurement costs. With respect to the existence of a second bid, the Government misses the point. The entire reprocurement was tainted by the improper involvement of Mr. Carlson in determining the scope of the work to be done. (Opinion at 31)

Contrary to the Government's assertions, the modifications offering \$1,247.20 have absolutely nothing to do with whether the Government met its burden of proof on the reprocurement. Government counsel continues to cite testimony that we found unpersuasive in the first instance as well as clearly contradicted by other credible evidence of Record. The Motion states that "VA provided evidence that VA was unaware of the full extent of deficiencies at the time this proposal was made. Hearing Transcript at 433." Based on very detailed Memoranda for the Record by VA's COTR Payne, we found that the VA was aware of most, if not all, of the deficiencies by early October 1996. (Opinion at 23)

The testimony of the contracting officer, which was self-serving and mistaken at best, was in direct conflict with contemporaneous records kept by the COTR. We found the COTR to be a credible witness. The Government has made no attempt to reconcile the two accounts but simply ignores the COTR's evidence.

Finally, the Government's Motion seems to argue that since higher amounts were sought, the \$12,472.58 withholding should be found reasonable by default. The Government failed to meet its burden of proof for any specific amount.

Accordingly, the Government's Motion for Reconsideration is denied.

DATE: **October 14, 1999**

WILLIAM E. THOMAS, JR.
Administrative Judge
Panel Chairman

We Concur:

MORRIS PULLARA, JR. *
Administrative Judge

JAMES K. ROBINSON
Administrative Judge